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MUTUAL LEGAL ASSISTANCE COOPERATION TREATY WITH MEXICO

SEPTEMBER 30 (legislative day, SEPTEMBER 26), 1988.—Ordered to be printed

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-13]

The Committee on Foreign Relations, to which was referred the Treaty on Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance, signed at Mexico City on December 9, 1987, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

BACKGROUND

The negotiation of mutual legal assistance treaties (MLAT's), treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be of assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit information provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

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Since the MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step toward agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each has been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, the Cayman Islands, Mexico, and Belgium have been signed and are pending.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) they fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts' and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLAT's are designed to streamline and make more effective the process of obtaining evidence. Each treaty provides for a Central Authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and uniformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

On December 9, 1987, the United States signed a treaty with the United Mexican States on mutual legal assistance in criminal matters, which was ratified by Mexico on December 29, 1987. This is the United States' first treaty on this topic which has been ratified by a Latin American country, and it is expected to be a valuable instrument in obtaining the evidence needed to stem transborder crime, particularly narcotics trafficking, but also crimes of violence and property crimes.

The United States has a special relationship with Mexico stemming from geographic proximity with a 1,900 mile undefended border. The two nations are closely linked in terms and trade, tourism, immigration, border industry, environment, and energy. The Presidents, Cabinet officials, and Members of Congress of both countries have conducted a continuing dialog for a number of years on the myriad of issues of mutual concern. Mexico is considered a major political power in the Latin American context and is a leader in hemispheric affairs.

Mexico is also the largest single source country for marijuana and heroin flowing in the United States. On April 14, 1988, the Senate voted 63–27 to disapprove the President's certification that Mexico has "cooperated fully" with the United States in eradicating and interdicting illicit narcotics. This Mutual Legal Assistance Treaty between the United States and Mexico offers an opportunity for the countries to increase cooperation and make significant progress in our mutual efforts to stop the ever-increasing narcotics trafficking which threatens the national security of both countries. As is the case with the Mutual Legal Assistance Treaty with the Bahamas, the MLAT with Mexico will serve as a useful benchmark in future determinations of Mexico's level of cooperation with the United States in eradicating and interdicting illicit narcotics.

Purpose

The treaty provides for assistance in the prevention, investigation, and prosecution of crimes, and in any other criminal proceedings. It also provides for assistance in "ancillary proceedings" related to criminal acts, thus permitting assistance in a veriety of civil and administrative proceedings.

The treaty does not require that the act under investigation be one which is subject to the jurisdiction of the judicial authorities of the Party States.

The kinds of assistance provided for under the treaty include but are not necessarily limited to: taking of testimony or statements of persons; provision of documents, records and evidence; executing requests for searches and seizures; obtaining of witness testimony; and taking of measures to immobilize, secure, or forfeit assets.

Committee Comments

The committee believes that Mutual Legal Assistance Treaties (MLAT's) are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. The treaty with Mexico will be the first MLAT with a Latin American country. It is particularly significant in that it represents the first attempt to reconcile two very different legal systems to afford a mechanism for cooperation.

The committee harbors no illusion that entry into force of an MLAT with Mexico will resolve all our law enforcement problems with Mexico, but believes the treaty is an important step in already improving cooperation on the part of Mexico in criminal matters.

The U.S. Justice Department has advised the committee that recent exchanges of information between the United States and Mexico with respect to both countries' prosecutions of those who kidnaped and murdered U.S. DEA agent Camarena have been significant. In the view of the Justice Department, these exchanges were possible because of the decision of Mexican Attorney General Garcia Ramirez to deal with the U.S. request for evidence as through the mutual assistance treaty was already in effect. By doing so, the United States was able to address evidentiary requirements under U.S. law, building on knowledge of Mexican and U.S. procedural requirements developed during the process of negotiating the MLAT, and obtain witnesses and admissible evidence for the recently concluded trial in Los Angeles at which all three were convicted.

The Justice Department also points out that by utilizing the structures for cooperation under the MLAT, the United States not only obtained witnesses and evidence for the U.S. trial, but provided evidence for the ongoing trial in Mexico of five other individuals indicted in the U.S. prosecution of Camarena's kidnapping and murder. Thus the concept that effective prosecution of all those responsible for the murder and kidnapping requires effective, prompt cooperation on both sides has already been established.

The committee does not dispute that there are legitimate concerns about corruption within the Mexican Government. However, it is the view of the committee that this treaty will enable the United States to deal with a certain quantum of criminal offenses in this country that it would not be able to deal with, at least not as effectively, if the treaty were not in force. In addition, with the treaty in place, the United States will have something more than anecdotal material to measure Mexico's willingness to cooperate fully with the United States in the war on drugs.

The committee also notes that the bi-partisan anti-drug legislation which will be introduced shortly contains new drug certification procedures and criteria that directly address official corruption in drug source and transit countries.

Concern has been voiced that corrupt elements in a country could distort the treaty for personal or political reasons, seeking information through the MLAT process which would be detrimental to U.S. law enforcement efforts. Paragraph 3 of Article I of the treaty explicitly permits the Requested State to deny assistance if execution of the request would "prejudice its security or other essential public policy or interest." The technical analysis to accompany the treaty elaborates as follows: "the negotiators intended that this language be flexible enough that neither Party would find itself obligated to grant assistance where doing so would seriously damage its basic institutions, violate its fundamental principles of justice, or threaten its security . . ." The committee believes this explicit basis for denying a request for assistance, along with the Justice Department's scrutiny of each request for assistance, protects against prejudicing ongoing U.S. investigations or prosecutions.

During committee consideration of the Treaty with Mexico, as well as the other five pending MLAT's, concern was expressed that the bilateral treaties could in some manner abridge the constitu-

tional rights of U.S. citizens. A reservation was proposed to each of the MLAT's asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," *Reid* v. *Covert,* 354 U.S. (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumscribes the government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instruments of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they properly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the United States wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also raises dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT request where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendants to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign government did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inappropriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as bank records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already well regulated by the courts. In roughly a decade's experience under the existing MLAT's no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to

negate the authority of the Court to ask the prosecution to make requests for information under the treaty.

COMMITTEE ACTION

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from Administration witnesses, Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988 the committee held another hearing at which the following public witnesses presented testimony:

Mr. Bruce Zagaris, Attorney, Berliner & Maloney, Washington, DC; Mr. Robert L. Pisani, Executive Director, International Legal Defense consel, Philadelphia, PA; Mr. Philip White, Attorney, Adam, McCullough & Beard, Washington, DC. The hearing record on this treaty as well as the other five MLATs is printed as an appendix to the Committee report on the Treaty with the Cayman Islands (Treaty Doc. 100–8).

The committee met to consider the Treaty between the Government of the United States of America and the United Mexican States on Mutual Assistance of September 27, 1988.

Senator Helms offered an amendment to the treaty conditioning ratification of the treaty on a Presidential certification "that Mexico does not have any senior government, military, or police official, or governor who engages in, encourages, or facilitates the production or distribution of illegal drugs." The amendment was defeated by a 4–14 vote with Senators Helms, Pressler, Trible, and McConnell voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, and Evans voting in the negative.

Senator Helms also offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3–15 vote with Senators Helms, Pressler, and Trible voting in the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry Simon, Sandford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans and McConnell voting in the negative.

The committee voted 17–2 to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Trible, Evans and McConnell. Nays: Senators Helms and Pressler.

SECTION-BY-SECTION ANALYSIS

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

TECHNICAL ANALYSIS OF THE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

FOR

MUTUAL LEGAL ASSISTANCE

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TECHNICAL ANALYSIS
OF THE

TREATY ON COOPERATION BETWEEN
THE UNITED STATES AND THE UNITED MEXICAN STATES
FOR MUTUAL LEGAL ASSISTANCE

On December 9, 1987, the United States and the United Mexican States signed a treaty on mutual legal assistance in criminal matters, which was ratified by Mexico on December 29, 1987. This is the United States' first treaty on this topic which has been ratified by a Latin American country, 1/ and it is expected to be a valuable instrument in the fight against trans-

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1/ The Treaty on Mutual Legal Assistance Between the United States and the Republic of Colombia, signed at Washington August 20, 1980, ratification advised by the Senate December 2, 1981, and instrument of ratification signed by the President January 4, 1982), has been ratified by the United States, but not by Colombia.

The United States currently has four bilateral mutual assistance treaties in force: Treaty between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, signed at Bern May 25, 1973, 27 UST 2019, TIAS 8302 (entered into force January 23, 1977); Treaty between the United States and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, signed at Ankara June 7, 1979, 32 UST 3111, TIAS 9891 (entered into force January 1, 1981); Treaty between the United States and the Kingdom of the Netherlands, together with a Related Exchange of Notes, signed at the Hague June 12,3 1981, TIAS 10734 (entered into force September 15, 1983); and Treaty between the United States and the Republic of Italy on Mutual Assistance in Criminal Matters, together with a Memorandum of Understanding, signed at Rome November 9, 1982, TIAS ____ (entered into force November 13, 1985).

In addition to the treaty with Mexico, the following mutual assistance treaties have not yet been ratified: Treaty between the United States and Canada on Mutual Legal Assistance in Criminal Matters, signed at Quebec City March 18, 1985; Treaty between the United States and the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok March 19, 1986; Treaty between the United States and the United Kingdom of Britain and Northern Ireland Concerning the Cayman Islands, signed at Grand Cayman July 3, 1986; Treaty between the United States and the Bahamas on Mutual Assistance in Criminal Matters, signed at Nassau June 12 and August 18, 1987; and Treaty between the United States and the Belgium on Mutual Legal Assistance in

(Footnote Continued)

border crime, especially drug trafficking, but also including crimes of violence and property crimes. The negotiators specifically discussed their intention to make the Treaty a positive instrument of cooperation which could alleviate conflicts and misunderstandings in law enforcement between the tow countries.

Article 1 -- Scope of the Treaty

The first paragraph of this Article, like the opening provisions of other mutual legal assistance treaties, provides for assistance in the prevention, investigation and prosecution of crimes and in any other criminal proceedings. It also provides for assistance in "ancillary proceedings" related to criminal acts. This language, and thus the scope of the Treaty, is intended to be as broad as possible.

The term "investigation" was understood to encompass grand jury proceedings in the United States, as well as other investigative measures taken in either country prior to the filing of formal charges. Inclusion of the term "any other criminal proceedings" makes it clear that the Treaty covers requests for assistance in the full range of criminal proceedings, including bail and sentencing hearings and proceedings relating to the parole and probation of offenders.

By including proceedings "ancillary" to criminal offenses, Article 1 permits assistance to be rendered in a variety of proceedings, which although not strictly criminal proceedings, are nonetheless related to, or based upon, criminal offenses. Thus, the Treaty will permit assistance in a variety of civil and administrative proceedings, such as those to forfeit the proceeds and instrumentalities of criminal offenses, to disbar a lawyer convicted of defrauding his clients or lending assistance to an illegal narcotics trafficking organization, or to remove from office a corrupt official. It is the intention of the parties that such proceedings fully qualify as bases for requests under the Treaty.

Extradition treaties generally condition the surrender of fugitives upon a showing of "double criminality," i.e., proof that the facts underlying the crime charged in the Requesting State would also constitute an offense in the Requested State. The first paragraph of Article 1 makes it clear however that there is no general prerequisite of "double criminality" for

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(Footnote Continued)
Criminal Matters, signed at Washington January 28, 1988.

The above-cited treaties are hereinafter cited in abbreviated form as, e.g., U.S.-Swiss Treaty.

cooperation under this Treaty, and that assistance may be rendered even if the matter under the investigation is not regulated by the Requested State's law. 2/ The only requirement is that the acts which prompt the request "are within the competence or jurisdiction of the Requesting Party at the time the assistance is requested." 3/ Accordingly, this Treaty provides for the broadest possible scope of covered offenses. Conceivably, absent a dual criminality requirement, there might be a case in which Requested State found the nature of the offense underlying the request so foreign and so inimical to its fundamental concepts of justice or criminal liability that it concluded that the request should be denied. The negotiators understood that should such an extraordinary case arise, the denial of the request would be based on Article 1(3)(b), the prejudice to essential public policy provision.

The first paragraph of Article 1 also makes clear that the Treaty does not contravene specific limitations of each Party's domestic laws. Paragraph 2 makes clear that the Treaty does not create any new jurisdiction or operational authority on the part of one Party to undertake actions in the territory of the other. Such principles, implicit in other mutual assistance treaties, were specifically articulated in this Treaty because of special sensitivity to these issues on the part of Mexican authorities. Moreover, both countries, because of our shared border, have been concerned about making clear the limits on the authority of law enforcement agents of each country in the territory of the other.

The limited bases for denying a request for assistance are set forth in the third paragraph of this Article. Denial of a request under this paragraph, however, is discretionary. Subparagraph (a) merely reiterates the principle described above that the Treaty's obligations do not supersede specific restrictions on assistance under the Requested State's domestic law. 4/

2/ Reflecting the stylistic preferences of the Mexican negotiators, the Treaty generally employs the term requesting or requested "State" when referring to a country in a physical or territorial sense, and requesting or requested "Party" when referring to a country as a governmental entity or authority. In this analysis, the term "State" will generally be used for purposes of simplicity.

3/ See, however, the discussion infra of Article 7, which notes that jurisdictional requirements of the Requested State may, in certain circumstances, be at issue when use of compulsory measures are contemplated.

4/ It is important to note that the Treaty does not permit denial of a request simply because the domestic law of the

(Footnote Continued)

In situations where there may be such a conflict with domestic law, however, the two Parties are to consult in order to determine if there might be alternative lawful means for providing the assistance requested. As discussed more fully below, such a situation might arise where Mexican law might prohibit assistance requested solely under the Treaty, but would permit assistance if the request were in an alternative form, such as a letter rogatory.

Subparagraph (b) permits the Requested State to deny assistance if execution of the request would "prejudice its security or other essential public policy or interest." A number of other mutual assistance treaties contain the same limitation, 5/ and it was intended that this basis for denying assistance would be invoked only in exceptional circumstances. For example, assistance might be denied if it would require disclosure of information which is classified for national security reasons or which would expose a confidential informant or his family to retribution. In effect, the negotiators intended that this language be flexible enough that neither Party would find itself obligated to grant assistance where doing so would seriously damage its basic institutions, violate its fundamental principles of justice, or threaten its security, yet restrictive enough that a request would be granted absent a compelling adverse impact on the Requesting State's interests. 6/

(Footnote Continued)
Requested State does not specifically authorize the type of assistance requested; rather, denial is permitted only if such assistance is in fact prohibited. This distinction is particularly important to the United States, which will likely request use of certain procedures needed to meet U.S. evidentiary requirements which have no analogue in Mexican law. (This is commonly the case where the United States, a common law jurisdiction, seeks assistance from a civil law country.) Thus, it was understood that the Requested State would execute a request pursuant to the procedures specified therein, unless such procedures were in fact impermissible under the Requested State's laws.

5/ See, e.g., Article 2 of the U.S.-Swiss Treaty ("the request would prejudice the security or public order of the Requested State"); Article 5 of the U.S.-Italy Treaty ("a request would prejudice the security or other essential public interests of the Requested State"); Article 2 of the U.S.-Thailand Treaty ("the request would prejudice the sovereignty, security, or other essential public interests of the Requested State"); and Article 5 of the U.S.-Canada Treaty ("the request is contrary to [the Requested State's] public interest").

6/ Because of the large number of joint or parallel
(Footnote Continued)

Subparagraphs (c) and (d) permit denial of a request if it concerns, respectively, a political offense or military offense not recognized by ordinary criminal law. Other mutual assistance treaties contain similar reservations. 7/

The final subparagraph states the obvious principle that a request may be denied if it does not conform with the provisions of the Treaty. This clause -- which again is a discretionary basis for denial -- serves the dual purposes of reminding the Requesting State to follow the Treaty and expressly granting the Requested State authority either to insist that a defect be cured or to waive such defect.

The fourth paragraph lists, in subparagraphs (a) through (h) the major types of assistance specifically considered and agreed upon by the negotiators of the Treaty. Certain of these types of assistance are described in further detail in subsequent Articles. Subparagraph (i) makes it clear that additional types of assistance which are consistent with the broad object and purpose of the Treaty may be afforded upon the agreement of both Parties.

The fifth and final paragraph of Article 1 is an express recognition that the Treaty is a law enforcement tool for use by the two Parties and not intended to be utilized by nongovernmental parties or institutions. Thus, private parties may not invoke the Treaty to obtain assistance or seek evidence for use

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investigations and proceedings undertaken by the United States and Mexico, the negotiators discussed the extent to which this clause might be invoked to deny a request because its execution might have some effect on a related matter in the Requested State. It was understood that in the vast majority of such cases, granting cooperation would not have any prejudicial impact, and that in those cases where execution of the request would in fact seriously jeopardize a significant case, the appropriate remedy would be to grant the request subject to conditions (as provided in Articles 3 and 6) or postpone its execution, but not to deny it outright. Indeed, this is the approach taken in a number of our treaties. See e.g. Article 10(2) of the U.S.-Netherlands Treaty; Article 5(3) of the U.S.-Italy Treaty; Article 5(2) of the U.S-Canada Treaty; and Article 2(3) of the U.S.-Thailand Treaty. In addition, the consultation provisions of the Treaty (e.g., Article 2(2)) can be used to ascertain ways to provide the requested assistance.

7/ See, e.g., Article 2(1)(c) of the U.S.-Swiss Treaty; Article 22(1)(a) of the U.S.-Turkey Treaty; Article 10(1)(b) of the U.S.-Netherlands Treaty; Article 5(1)(b) of the U.S.-Italy Treaty; Article 2(1)(b) of the U.S.-Thailand Treaty; and Article 3(2)(b) of U.S.-Cayman Islands Treaty.

in solely private matters. This reflects the fact that the purpose of this Treaty is to enhance the effectiveness of the law enforcement authorities, and not to provide an alternative method of evidence gathering for others.

This paragraph further states that the Treaty is not intended to create any right to obtain, suppress, or exclude evidence, or to impede the execution of a request. Thus, a person from whom records are sought would not be free to oppose the execution of the request by claiming that it does not comply with the Treaty's formal requirements. Similarly, any evidence obtained by the United States from Mexico under the Treaty would not be suppressed or excluded solely on the basis that the United States' request failed to comply with provisions of the Treaty.

The terms of the fifth paragraph are consistent with those in other United States mutual legal assistance treaties. 8/

Article 2 -- Coordinating Authorities

Article 2 of the Treaty provides for designation by each Party of a "Coordinating Authority" which will be responsible for implementing the Treaty. All other United States mutual assistance treaties have a similar provision, although the term "Central Authority" is used. Mexico preferred the term "Coordinating Authority" as more appropriate in light of its federal system. There is no substantive difference in the choice of terms. For Mexico, the Coordinating Authority is the Procuraduria General de la Republica (the equivalent of the Attorney General's Office), and for the United States, it is the "Central Authority of the United States Department of Justice." 9/

The first paragraph of Article 2 obliges each Party to undertake diligent efforts to execute a request promptly. The

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8/ See, e.g., Article 37(1) of the U.S.-Swiss Treaty; Article 18(2) of the U.S.-Netherlands Treaty; Article 1(4) of the U.S.-Italy Treaty; Article 2(4) of the U.S.-Canada Treaty; Article 1(4) and (5) of the U.S.-Thailand Treaty; and Article 1(3) of the U.S.-Cayman Islands Treaty.

9/ Pursuant to 28 CFR §0.64-1, the powers and functions of a "Central Authority" under a mutual legal assistance treaty have been delegated to the Assistant Attorney General for the Criminal Division, who in turn has redelegated this authority to the Deputy Assistant Attorney General and the Director of the Office of International Affairs. Directive No. 81, 44 FR 18661, March 29, 1979, as amended, 45 FR 6541, January 29, 1980; 48 FR 54595, December 6, 1983.

Treaty contemplates that the Coordinating Authority which receives a request will first review the request and immediately notify the Coordinating Authority of the Requesting State if it is of the opinion that the request does not comply with the Treaty's terms. If the request does satisfy the Treaty's requirements and the assistance sought can be provided by the Coordinating Authority itself, that Authority will comply with the request immediately. If the request meets the Treaty's requirements but its execution requires action by some other agency in the Requested State, the Coordinating Authority of that State will see to it that the request is promptly transmitted to the correct authority for execution, and take responsibility for ensuring a prompt response.

Where the United States is the Requested State, it is anticipated that the Coordinating Authority will transmit most requests from Mexico to federal investigators, prosecutors or judicial officials for execution. However, a request may be transmitted to state officials for execution if the Coordinating Authority deems it more appropriate to do so. The second and third sentences of the first paragraph authorize and require the federal, state or local agency or authority selected by the Central Authority to take whatever action would be necessary and within its power to execute the request.

This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Mexico. Rather, it is anticipated that when a request from Mexico requires compulsory process for execution, in most cases the Department of Justice would ask a federal court to issue the necessary process or court order under 28 U.S.C. § 1782 and the provisions of this Treaty. 10/

10/ One court has interpreted 28 U.S.C. § 1782 as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. Fonesca v. Blumenthal, 620 F.2d 322 (2nd Cir. 1980); In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1016 (2nd Cir. 1976). This interpretation poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. The second sentence of this paragraph of Article 2 specifically authorizes the Requested State to take "all necessary steps to promptly execute the request." Since the Treaty permits requests to be made in conjunction with matter not within the jurisdiction of an adjudicatory "tribunal" in Mexico,
(Footnote Continued)

The second and third paragraphs of Article 2 provide that the Coordinating Authorities shall, upon mutual agreement, consult regularly to assure the most effective implementation of the Treaty and anticipate and resolve any problems thereunder. 11/

Article 3 -- Limitations on Assistance

The first paragraph is similar to Article 3(2) of our mutual assistance treaty with Switzerland, and permits the Requested State to impose appropriate conditions on its assistance in lieu of denying a request outright. For example, a State might request information which could be used either in a routine criminal case (which would be within the scope of the Treaty) or in the prosecution of a political offense (which would be a basis for denial under Article 1). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State should notify the Requesting State of proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence, it must respect the conditions specified by the Requested State with respect to the evidence.

The second paragraph requires the Coordinating Authority of the Requested Party to promptly notify the other Coordinating Authority of the reasons for denying a request. This assures that the Requested Party will provide some explanation for not providing the information or evidence sought. This should eliminate misunderstandings which can arise in the operation of the Treaty, and enable the Requesting Party to better prepare its requests in the future. It is intended that this paragraph would also apply where there is a partial denial of the request.

Article 4 -- Contents of the Request

The first paragraph requires that requests be made in writing and be translated into the language of the Requested State. In urgent cases, an oral request is permitted, but must be followed as soon as possible thereafter by a written request.

(Footnote Continued)
this paragraph accords our courts slightly broader authority than 28 U.S.C. § 1782, as interpreted in the Fonesca and India cases.

11/ In addition, Article 18 mandates review of the functioning of the Treaty at least biannually.

The negotiators recognized that for certain types of assistance, an oral request might not suffice.

Set out in the second paragraph is a list of information deemed crucial to efficient operation of the Treaty, and thus required to be included in each request. The third paragraph outlines kinds of information which may be important but not crucial, or may pertain only to particular types of assistance, and thus are to be provided "to the extent necessary and possible."

In keeping with the intention of the Parties that requests be as simple and straightforward as possible, there is no requirement under the Treaty that a request be legalized or certified in any particular manner. One exception is set out in paragraph four, which simply provides that documents to be served pursuant to a request under the Treaty must be duly translated, certified and authenticated. The request for service itself, however, need not be.

It is anticipated that some requests for assistance may contain information which either must or should remain confidential. For example, it may be necessary for the United States to set out information which is ordinarily protected by Rule 6(e), Federal Rules of Criminal Procedure, in explaining the "subject matter of the investigation, prosecution or proceeding" as required under paragraph 2(b). Therefore, paragraph 5 of this Article provides a means whereby the Requesting Party may keep the information in the request confidential. If the Requested State cannot execute the request without disclosing the information in question (as may be the case if execution requires a public judicial proceeding in the Requested State), or for some reason this confidentiality cannot be assured, the Treaty obliges the Requested State to say so, thereby giving the Requesting State an opportunity to withdraw the request rather than risk jeopardizing its investigation or proceeding by disclosure of the information.

Article 5 -- Costs

Article 5 of the Treaty is largely self-explanatory, and proceeds from the basic premise that the Requested State should bear all costs relating to execution of the request, with only two exceptions. The Requesting State must pay the lawful fees and expenses of witnesses, both expert and lay, and also expenses relating to the travel of witnesses (or other persons) who are asked to appear in the Requesting State. The issue of costs is

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treated similarly in other United States mutual assistance treaties. 12/

Article 6 -- Limitations on Use

Article 4 of the Treaty states that the Requesting State must specify the purpose for which the information, evidence or assistance is sought under the Treaty. The first paragraph of Article 6 requires that the information or evidence provided under the Treaty will not be used for any purpose other than that stated in the request without the prior consent of the Coordinating Authority of the Requested State. A similar use limitation is included in other of our mutual assistance treaties. 13/

Once information obtained under the Treaty has been revealed in a proceeding resulting from the investigation or prosecution on which the request is based, that information effectively becomes part of the public domain. The information is likely to become a matter of common knowledge, perhaps even cited or described in the press. When that occurs, it is practically impossible for the Coordinating Authority of the Requesting State to continue to block the use of that information by third parties or other government agencies. Therefore, paragraph three of this Article recognizes that in such circumstances, the use limitation set out in the first paragraph should no longer be applicable and the information or evidence may be used for any purpose.

The second paragraph of Article 6 permits the Party which has received a request for evidence or information to provide it on the condition that it be kept confidential. 14/ For example, the Requested State could insist that the Requesting State limit access to information which could endanger the safety of an

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12/ See, e.g., Article 41 of the U.S.-Turkey Treaty; Article 17 of the U.S.-Netherlands Treaty; Article 7 of the U.S.-Italy Treaty; Article 8 of the U.S.-Canada Treaty; Article 6 of the U.S.-Thailand Treaty; and Article 6 of the U.S.-Cayman Islands Treaty.

13/ See, e.g., Article 5 of the U.S.-Swiss Treaty; Article 23 of the U.S.-Turkey Treaty; Article 11(2) of the U.S.-Netherlands Treaty; Article 8(3) of the U.S.-Italy Treaty; Article 9(2) of the U.S.-Canada Treaty; Article 7(1) of the U.S.-Thailand Treaty; and Article 7(1) of the U.S.-Cayman Islands Treaty.

14/ Such a provision is common in our mutual assitance treaties. See, e.g., Article 11(1) of the U.S.-Netherlands Treaty; Article 8(1) of the U.S.-Italy Treaty; and Article 9(1) of the U.S.-Canada Treaty.

informant, or unduly prejudice the interests of a person not connected in any way with the matter being investigated in the Requesting State. The provision would also permit imposition of conditions of confidentiality required by the law of the Requested State. For instance, information obtained from a grand jury might be provided to Mexican authorities only upon agreement by the latter to maintain the same degree of secrecy to which the information would be entitled in the United States. It was understood that conditions of confidentiality are to be imposed only when necessary, and should be tailored to fit the circumstances of each case. If the Requesting State cannot comply with the conditions sought to be imposed, the Parties are to consult to determine if there might not be other conditions satisfactory to the Parties. 15/

Article 7 -- Testimony in the Requested State

The first paragraph states that the Requested State shall, if necessary, compel a person by subpoena to give testimony or produce documents, records and objects in the Requested State "to the same extent as in criminal investigations or proceedings in that State." This Treaty, in conjunction with 28 U.S.C. § 1782, will give the United States broad authority to use compulsory measures, if necessary, to obtain testimony or evidence requested by Mexico. There are certain limitations under Mexican domestic law, however, which at present restrict full reciprocity in this area. Nonetheless, these limitations are unlikely to impede assistance in the criminal matters of greatest concern to the United States.

The primary means of invoking the use of compulsory measures in Mexico will be pursuant to Article 123, et seq. of the Mexican Code of Penal Procedure. Pursuant to these provisions, the Procuraduria General de la Republica (Attorney General's Office) may commence or cause to be commenced an initial investigation (averiguacion previa) on the basis of information, including that in a request under this Treaty, if the facts indicate possible Mexican jurisdiction. Once such an initial investigation is commenced, the testimony of witnesses may be compelled, search warrants can be sought, and documents can be ordered to be produced and transmitted to the United States, including business and bank records in the possession of persons other than banking

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15/ The approach taken in this Treaty -- that the Parties are to consult to resolve difficulties of compliance with the Requested State's conditions of confidentiality -- is similar to that in Article 9 of the U.S.-Canada Treaty.

institutions, 16/ even if the investigation does not ultimately lead to the exercise of a criminal action in Mexico. 17/

Obviously, invoking this powerful authority entails a requirement not otherwise contemplated by the Treaty, i.e., potential Mexican jurisdiction over the offense. While this limitation on providing assistance under Article 123 et seq. represents some restriction on the otherwise broad scope of the Treaty, the negotiators were satisfied that expansive Mexican principles of jurisdiction would permit compulsory measures to be used to give assistance to the United States in the majority of criminal matters in which cooperation between the United States and Mexico is most important, including drug trafficking, money laundering, and border violence, as well as the transportation of stolen property, the proceeds of crime and illicit arms across the border. In effect, Mexican law confers jurisdiction over any offense in which a Mexican is a perpetrator or victim, in which any criminal acts take place in Mexico, or in which there are any "effects" or intended "effects" in Mexico.

The negotiators recognized that some requests for assistance might not present facts sufficient to invoke compulsory measures under the above-cited Articles of the Mexican Code. For example, there would be no authority to compel the testimony in Mexico of a person who had witnessed a robbery committed by a U.S. citizen on a U.S. citizen in New York. (Of course, if the witness were willing to give such testimony, his testimony could be taken pursuant to the Treaty.)

While the U.S. negotiators clearly would have preferred more expansive Mexican authority to use compulsory measures in execution of a United States treaty request, achieving this end would have required significant amendment of Mexican domestic law, a measure which the Mexican negotiators believed had little prospect of success and which could have significantly

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16/ See the discussion infra concerning a bank's production of account records.

17/ It was suggested that where the authority under Article 123 et seq. of the Mexican Code was not applicable, there might be the opportunity to compel testimony pursuant to letters rogatory transmitted under the Treaty. While the negotiators did not foreclose resort to this option, they had serious doubts whether a Mexican court in fact would be able to enforce compulsory measures pursuant to a letter rogatory which gave no factual basis giving rise to potential Mexican criminal jurisdiction. However, use of the letters rogatory option could be helpful in the not infrequent situation where a witness insists on issuance of a subpoena, but has made it clear that he will not contest enforcement of the subpoena.

jeopardized prompt ratification of the Treaty itself. Thus, after extensive discussions on this matter, it was the sense of the negotiators that the great majority of cases in which the United States would need compulsory measures to obtain evidence or testimony in Mexico would fall within the broad bases for invoking potential Mexican criminal jurisdiction, and that thus, on balance, the benefits worked by having at long last an established mechanism for obtaining such evidence or testimony outweighed the problems posed in attempting to secure the availability of compulsory measures in every conceivable case. In addition, the language of the Treaty is flexible enough to encompass the provision of further assistance should Mexican law be changed.

In the course of taking testimony on behalf of a foreign country, questions often arise of the application of testimonial privileges and immunities under the foreign country's law. The best method of resolving such questions is to reserve them for resolution by the courts of the jurisdiction under whose laws they arise. Thus, paragraph 2 of Article 7 provides that when a witness asserts a claim of immunity, incapacity or privilege under the law of the Requesting State, the testimony shall nonetheless be taken and forwarded to the Requesting State where the courts (or other competent authorities) of that State can resolve the claim. The applicability of the privilege can then be determined in the Requesting State, where the scope of the privilege and the legislative and policy reasons underlying it are best understood. A similar provision appears in many of our recent mutual legal assistance treaties. 18/

On the other hand, claims of immunity, incapacity and privilege under the law of the Requested State would be resolved by the authorities of that State at the time the testimony is taken. Thus, a witness questioned in the United States pursuant to a treaty request from Mexico would have the right to invoke any of the testimonial privileges (such as attorney-client privilege, interspousal privilege, etc.) usually available in proceedings here, as well as the constitutional privilege against self-incrimination. 19/

Paragraphs three and four of Article 7 address the need for persons from the Requesting State to be present at the taking of testimony. Paragraph four will permit a U.S. prosecutor and/or

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18/ See, e.g., Article 5(1) of the U.S.-Netherlands Treaty; Article 14(6) of the U.S.-Italy Treaty; Article 8(2) of the U.S.-Thailand Treaty; and Article 8(2) of the U.S.-Cayman Islands Treaty.

19/ This is consistent with the approach taken in Title 28, United States Code, § 1782.

investigating agent (or other appropriate person specified in the request) to be present at, and assist in, the taking of a statement of a witness in Mexico. Most importantly, it will permit the presence of both the prosecutor and defense counsel at the taking of a deposition for trial pursuant to Rule 15 of the Federal Rules of Criminal Procedures.

As is the case in most civil law countries, the visiting prosecutor and defense counsel will ordinarily not be permitted to pose questions directly to the witness. Instead, only the presiding official (generally the agent of the Ministerio Publico (i.e., prosecutor), but in some instances, a trial judge) can directly question the witnesses. However, both prosecution and defense counsel will be able to submit to the presiding official the questions which they wish to be posed to the witness. Although this procedure is not exactly analogous to the method of examining witnesses under our system, it has been found to be adequate to meet Constitutional requirements that the defense be afforded an opportunity to cross-examine witnesses. 20/

The fifth paragraph provides that documents, records, and copies thereof, which are produced under Article 7, shall be certified in accordance with the procedures specified in the request. This provision, therefore, will permit the United States to obtain certifications necessary to establish the admissibility of documentary evidence obtained from Mexico. The most important type of certification is that provided in 18 U.S.C. § 3505, which permits foreign business records, including bank records, to be admitted into evidence without the necessity of calling as a witness at trial the foreign custodian of the records.

The U.S. negotiators explored at length the availability of Mexican bank records pursuant to a treaty request, since Mexico, like many jurisdictions, currently has domestic law provisions limiting the disclosure of such records (and also insurance records). Pursuant to Mexican law, bank records would be available in the following situations: (1) where the account holder consented to their disclosure, including an authorization to disclose ordered by a United States court; 21/ (2) pursuant to

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20/ See United States v. Salim, 664 F. Supp. 682 (E.D.N.Y. 1987), and cases cited therein.

21/ See United States v. Ghidoni, 732 F.2d 814 (11th Cir.) cert. denied 105 S.Ct. 328 (1984). The Mexican negotiators stated an account holder consent pursuant to a court-ordered "Ghidoni" waiver would not be problematic. Some foreign jurisdictions have refused to recognize the validity of such compelled authorizations to disclose bank records otherwise protected by foreign bank secrecy laws.

a court order, which would generally be obtained by an agent of the Ministerio Publico pursuant to the provisions of Article 123 et seq. of the Mexican Code, discussed supra; and (3) pursuant to a letter rogatory, provided the account holder had an opportunity to contest disclosure, either before the U.S. court issuing the letters rogatory or before the Mexican authority responsible for its execution. The U.S. negotiators were satisfied that the majority of our requests for bank records could be granted pursuant to one of the bases discussed above.

Article 8 -- Transferring Persons in Custody

In criminal cases, the need may arise for the testimony in the United States of a witness serving a sentence in a foreign country or for his presence in the United States for purposes of identification. Similarly, foreign countries may need the presence of persons serving sentence in the United States. These situations are particularly likely to arise between the United States and Mexico because of the number of trans-border crimes, where witnesses, suspects or defendants needed for proceedings in one country are in custody in the other. Article 8 provides a clearly articulated basis for cooperation between the United States and Mexico in these matters. Such provisions are commonly found in our mutual legal assistance treaties. 22/

Under the first paragraph, a person in custody shall be transferred if he consents and the Requested State has no reasonable basis to deny the request. It was understood that the most likely impediment to transfer of a person in custody -- his required presence at proceedings in the Requested State -- would be a basis for postponing, rather than flatly denying, the request for transfer.

The Article's second paragraph provides express authority for the State receiving the person to maintain the person in custody throughout his stay there, unless the Requested State specifically authorizes his release. This paragraph also requires the Requesting State to return the person as soon as circumstances permit or as otherwise agreed. While the consent of the person is required for the initial transfer, this provision does not require the prisoner to consent again to his return to the Requested State.

22/ See, e.g., Article 26 of the U.S.-Swiss Treaty; Article 32 of the U.S.-Turkey Treaty; Article 7 of the U.S.-Netherlands Treaty: Article 16 of the U.S.-Italy Treaty; Article 15 of the U.S.-Canada Treaty; Article 12 of the U.S.-Thailand Treaty; and Article 11 of the U.S.-Cayman Islands Treaty.

Once the Requested State has agreed to assist its treaty partner in an investigation or proceeding pursuant to this Article, it would be inappropriate for the Requesting State to hold the person transferred and require full-dress extradition proceedings before allowing his return to the Requested State. Therefore, subparagraph (c) of the second paragraph states that extradition proceedings will not be required before the status quo is restored by the return of the person transferred. Subparagraph (d) simply provides that the prisoner is to receive credit in the Requested State for time served in custody in the Requesting State pursuant to this Article.

Article 9 -- Appearance in the Requesting State

Article 9 provides that, upon request, the Requested State shall invite witnesses who are located in its territory and needed in the Requesting State to travel to the Requesting State to testify. An appearance in the Requesting State under this Article is not mandatory, and the invitation may be refused by the prospective witness.

Of course, the Requesting State would be expected to pay the expenses of such an appearance, and this Article specifically provides that the witness be informed of the amount and kind of allowances and expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, room and board, and any ordinary witness fees provided under the laws of the Requesting State.

Article 10 -- Providing Records of Government Agencies

Article 10 provides for access to government records and other documentary information. It is anticipated that the kinds of government information which will be most commonly sought by the U.S. under this provision will include documents from the files of the Mexican police or other investigative authorities. It is anticipated that Mexican requests for United States government documents will generally fall into the same category.

The first paragraph obliges each State to furnish to the other publicly available records of its departments and agencies. The term "government departments and agencies" includes executive, judicial and legislative units at the federal, state and local level in either State.

The second paragraph obligates the Requested State, except where expressly prohibited by its domestic law, to provide its treaty partner with any non-public information or record held by a government agency or departments "to the same extent and under the same conditions as it would be available" to the judicial or law enforcement authorities of the Requested State. It was the

intention of the negotiators that the Coordinating Authority of the Requested State would determine what that extent and what those conditions would be.

The negotiators further specifically discussed whether the this Article of the Treaty, and, in particular, the Article's second paragraph, should serve as a basis for exchange of tax information. The U.S. delegation pursued this discussion in light of the significance of 26 U.S.C. § 6103(k)(4) to our ability to provide tax information to foreign authorities. Both delegations agreed that it was their intent that assistance to be provided under the Treaty would include tax information. The U.S. delegation was, therefore, satisfied with the understandings and agreements so as to make this Treaty a "convention" within the meaning of 26 U.S.C. 6103(k)(4).

With respect to the obligation imposed in the second paragraph, the negotiators recognized that government files in each State might contain some kinds of information which would be available to investigative authorities in that State, but which would justifiably be deemed inappropriate to release (or to release unconditionally) to a foreign government. Other provisions of the Treaty, such as those permitting the imposition of conditions of confidentiality (Article 6(2)) and the outright denial of a request if the Requested State's essential interests might be jeopardized (Article 1(3)(b)), provide sufficient flexibility to address these situations on a case-by-case basis.

The third paragraph of Article 9 states that documents provided under this Article are to be authenticated or certified in the manner specified in the request. This will permit the United States to request and obtain certification of foreign public documents in a manner, such as that specified in Rule 902(3) of the Federal Rules of Evidence, which will render them admissible in our courts.

Article 11 -- Immobilizing, Securing and Forfeiture of Assets

A major goal of this Treaty is to enhance the efforts of both the United States and Mexico in the war against narcotics trafficking. One significant strategy in that war is reflected in the efforts by United States authorities to seize and confiscate the money, property and other proceeds of drug trafficking.

Article 11 is similar to provisions of United States' mutual legal assistance treaties with Thailand, Canada and the Cayman Islands. (See Articles 15, 17 and 16, respectively, of those treaties.) The first paragraph authorizes the Coordinating Authority of one State to notify the other of the existence in the latter's territory of "proceeds, fruits or instrumentalities of crime." These terms are intended to include such things as

money, vessels or other valuables which either were used in the crime or were purchased or obtained as a result of the offense.

Upon receipt of notice under this Article, the Coordinating Authority of the State in which the objects are located may take whatever action is appropriate under the law in that State. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Mexico, they might be seized in aid of a prosecution under 18 U.S.C. § 2314, or in anticipation of a civil action for the return of the assets to the lawful owners. If the assets were located in Mexico, we hope similar action could be taken pursuant to Mexican law.

If the assets in question are the fruits of drug trafficking, Article 11 contemplates that the treaty partners will be especially willing to help one another. Recent legislation in the United States expands the authority of law enforcement officials to seize the proceeds of drug trafficking. One portion of that law -- 18 U.S.C. §981(a)(1)(B) -- also allows the forfeiture to the United States of property "which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance ...." This is consistent with the laws in other countries, such as Switzerland, 23/ and there is a growing trend among nations toward legislation of this kind in the battle against narcotics trafficking. 24/

The second paragraph of Article 11 states that the Parties to the Treaty are to assist each other in proceedings relating to "immobilizing, securing and forfeiture of the proceeds, fruits and instrumentalities of crime, restitution and collection of fines." The traditional rule was that no state is obliged to aid another in the execution of penal laws respecting enforcement of fines or forfeiture of criminal assets. However, this rule is gradually changing. Moreover, any country is always free to assume by treaty a broader obligation than customary international law might impose on it when that country's authorities recognize that it is in the national interest to do so. In the second paragraph of Article 11, the parties to this Treaty assume an obligation to aid one another, upon request, in

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23/ We understand Canada is now considering similar legislation.

24/ See, e.g., the analysis and text of Article 3 of the U.N. Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which calls for the signatory nations to enact broad legislation to forfeit illicit drug proceeds and to assist one another in such matters, as set out in A Report on the Status of the Draft Convention, the U.S. Negotiating Position, and Issues for the Senate, S. Prt. No. 100-64, 100th Cong., 1st Sess., 6-11, 25-26 (1987).

proceedings relating to seizure and forfeiture of criminal assets, restoring illegally obtained funds or articles to their rightful owners, and the collection of fines imposed as sentences in criminal prosecutions.

Thus, if the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or to enforce a judgment of forfeiture or fine in the Requesting State, the Treaty authorizes and requires that it do so. The language of the provision is carefully selected, however, to not require the United States or Mexico to take any action which would go beyond "the extent permitted by their respective laws." It does not mandate institution of forfeiture proceedings in either country, if the relevant authorities do not deem such action appropriate.

Pursuant to recently enacted United States law (18 U.S.C. § 981(i)(1)), the United States may transfer an equitable share of certain forfeited property to other countries. Under regulations to be promulgated by the Attorney General, this equitable share will generally reflect the direct or indirect contribution of the foreign government in the law enforcement activity which led to the seizure and forfeiture of the property. The new law requires that these provisions operate only "to the extent provided for by Treaty" and pursuant to "treaties providing for the transfer of forfeited properties to the foreign country," and the negotiators drafted Article 11 broadly enough to ensure that it would authorize and provide for such transfers. Thus, Article 11 will enable either Party to transfer to the other forfeited assets, or the proceeds of their sale, to the other Party to the extent permitted by their respective laws.

Article 12 -- Search and Seizure

It is sometimes in the interest of justice for one State to ask another to search for, secure and deliver articles or objects needed in the former country for use as evidence or for other purposes. United States courts can and do execute such requests now under 28 U.S.C. § 1782. 25/ Article 12 of the Treaty creates a formal framework for handling such a request in either country.

In order for there to be an obligation that a search and seizure request be executed, it must include "information justifying such action under the laws of the Requested State."

25/ See, e.g., United States ex rel. Public Prosecutor of Rotterdam, Netherlands v. Richard Jean Van Aalst, Case No. 84-67-Misc-018 (M.D. Fla., Orlando Div.), cited in Ellis and Pisani, United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 International Lawyer 189, 215 (1985).

This means that normally a request to the United States from Mexico will have to be supported by probable cause for the search. A United States request to Mexico would have to satisfy the corresponding evidentiary standard there, and, as noted above in the discussion of Article 7, would ordinarily have to provide a reasonable basis for finding potential Mexican criminal jurisdiction over the offense. It is contemplated that the request would be carried out in strict accordance with the law of the country in which the search would be conducted.

The second paragraph of this Article is designed to ensure that, upon request, a record is kept of articles seized and delivered up under the Treaty. This provision effectively permits the Requesting State to obtain detailed and reliable information regarding the condition of the article at the time of seizure, and the chain of custody between seizure and delivery to the Requesting State.

This Article also requires that the certificates prepared for this purpose will be admissible without additional authentification at trial in the Requesting State. This is important because the smooth operation of the Treaty requires minimizing the burden, expense and inconvenience to the Requested State in having to send its law enforcement officers to the Requesting State to provide authentification and chain of custody testimony each time evidence produced pursuant to this Article is used. The requirement that the certificates be admissible without additional authentification at trial leaves the trier of fact free to disregard the certificate if there is some other reason to do so aside from authenticity.

Article 13 -- Location or Identification of Persons

Article 13 provides for ascertaining the identity or whereabouts in the Requested State of persons (such as witnesses, potential defendants, victims, or experts) where such information is of importance in connection with an investigation or proceeding covered by the Treaty. This is a standard provision contained in all of our mutual legal assistance treaties. 26/

26/ See Article 11 of the U.S.-Swiss Treaty; Article 37 of the U.S.-Turkey Treaty; Article 2 of the U.S.-Netherlands Treaty; Article 10 of the U.S.-Italy Treaty; Article 10 of the U.S.-Canada Treaty; Article 14 of the U.S.-Cayman Islands Treaty; and Article 13 of the U.S.-Thailand Treaty.

Article 14 -- Serving Documents

Article 14 creates an obligation on the part of the Coordinating Authority of the Requested State to arrange for or effect the service of any legal document, such as a summons, complaint or subpoena, at the request of the Coordinating Authority of the other State. This provision does not limit or restrict any other means of extraterritorial service of process provided for in Mexican or United States law.

It is expected that when the United States is the Requested State, service under the Treaty will be made either by registered mail (in the absence of any request by Mexico to follow any specified procedure for service), or by the United States Marshals Service in instances where personal service is requested. Proof of service is to be provided, if so specified in the request.

This Article also states that where the document to be served calls for the appearance of the person in the Requesting State, the document must be transmitted by the Requesting State a reasonable time before the scheduled appearance. Thus, if the United States were to ask Mexico to serve a subpoena issued pursuant to 28 U.S.C. § 1783, the request would have to be submitted a reasonable time in advance of the hearing or trial at which the respondent is expected to appear. This is to allow sufficient time for service to be effected and for the respondent to make arrangements for his appearance. It is anticipated that the Coordinating Authorities will agree between themselves upon guidelines for the smooth implementation of this provision.

Article 15 -- Compatibility with other International Agreements and Domestic Laws

Article 15 states that assistance and procedures provided by the Treaty shall not prevent or restrict assistance available under any other international agreement between the two countries. It also provides that the Treaty shall not be deemed to prevent recourse to assistance available under the internal laws of either country. Thus, the Treaty leaves undisturbed the provisions of United States and Mexican law on execution of letters rogatory, and does not alter preexisting arrangements concerning investigative assistance, such as that provided through the International Criminal Police Organization (INTERPOL). This is a common provision in United States mutual legal assistance treaties. 27/

27/ See Article 19 of the U.S.-Italy Treaty; Article 19 of the U.S.-Thailand Treaty; Article 3(1) of the U.S.-Canada Treaty; and Article 17(1) of the Cayman Islands Treaty.

Article 16 -- Ratification and Entry Into Force

This Article contains standard language concerning the procedure for exchange of instruments of ratification and the entry into force of the Treaty.

Article 17 -- Termination

This Article contains standard language concerning the procedure for terminating the Treaty. Article 17 states that one Party must give six months' notice to the other of its intent to terminate the Treaty. This requirement is not unusual; a similar requirement is contained in our mutual legal assistance treaties with Switzerland, Turkey, the Netherlands, Canada, the Cayman Islands, and Thailand.

Article 18 -- Review

The final Article of the Treaty complements the consultation provisions of Article 2(2) by requiring that the United States and Mexico meet at least biannually to review the effectiveness of the Treaty and undertake whatever measures may be necessary to improve its effectiveness. Both Parties agreed that requiring a regular review of the Treaty's implementation would foster its more efficient use and also generally enhance law enforcement cooperation between the United States and Mexico.

Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate give its advise and consent to ratification of the Treaty on Cooperation between the United States of America and the United Mexican States for Mutual Legal Assistance, signed at Mexico City on December 9, 1987.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

MEXICO MUTUAL LEGAL ASSISTANCE TREATY

In March of 1988 the State Department released its second annual International Narcotics Control Strategy Report. In the chapter on Mexico, the State Department reported:

> Mexico is a major producer of cannabis and opium poppy and continues to be the largest single-country source of the heroin and marijuana source of the heroin and marijuana available in the United States . . . U.S. officials report that the levels of U.S.-bound cocaine transiting Mexico have significantly increased.

The report goes on to say that:

> In the opinion of the U.S. Customs Service, the single most important factor which undermines effective and meaningful narcotics cooperation with Mexico is the level of official corruption within the Mexican Government. Documented violations by Mexican law enforcement officials are becoming more prevalent . . . Information gathered to date indicates significant levels of narcotics corruption on the part of Mexican officials.

Now the State Department is asking the Senate to consent to ratification of a treaty with this same government—a government which the report said had significant levels of narcotics corruption in its officials—for the express purpose of fighting drug trafficking.

One must ask who would benefit from such a treaty—U.S. law enforcement, or corrupt officials within the Mexican Government?

Mexico's situation parallels that of Panama's only a few years ago. There is a great deal of evidence that General Manuel Antonio Noriega has assisted the drug trade for many years. The U.S. relationship with Panama has deteriorated precisely because of the drug issue and the State Department's failure to deal with the crisis over 10 years ago.

In light of General Noriega's activities, I doubt this committee would even look at a mutual assistance treaty with Panama—if one were to be proposed. Similarly, it is unwise at this time to ratify this treaty with a Mexican Government which even the State Department admits is rife with corruption. We cannot fight the war on drugs by engaging in a partnership with the drug traffickers.

And we cannot fight drugs by bestowing legitimacy on governments which are full of corrupt officials.

Nor can we fight drugs by giving corrupt governments the right to receive legal evidence and assistance from the U.S. Government.

Yet, if the State Department's own report is accurate about the level of official narcotics corruption in Mexico, then ratification of this treaty would make us partners with Mexican drug traffickers. It would bestow legitimacy upon a government corrupted by drug traffickers. It would grant drug traffickers the right to receive information and assistance from U.S. officials.

But, if the Senate wants to be serious about fighting drugs, the Senate should demand assurances that the senior government officials in Mexico are not involved in drug trafficking before we ratify a treaty with Mexico.

I intend to propose an amendment of the floor to provide us with precisely such assurances. Specifically, it required that the treaty with Mexico not be retified by the President until be certifies to the Senate that Mexico "does not have any senior government, military, or policy official, who engages in, encourages, or facilities the production or distribution of illegal drugs."

The amendment is as simple as that. If the Government of Mexico cannot meet this simple test, the United States should not become partners.

In March 1988, the U.S. Senate voted 63 to 27 in favor of a Resolution of Disapproval of the narcotics certification for Mexico under omnibus drug bill of 1986. The Senate took this significant action because Mexico simply had not cooperated in the past year with the United States to halt drug production, trafficking, or money laundering. Inasmuch as the Senate concluded that the Mexicans have refused to cooperate up until now, why should we believe that the situation would be any different if this treaty goes into effect?

On February 23, 1988, William von Raab, the Commissioner of the United States Customs Service wrote to Miss Ann Wrobleski, the Assistant Secretary of State for International Narcotics Matters. In that letter, Commissioner von Raab said: "There is corruption among senior level Mexican law enforcement officials, and corruption is pervasive throughout the law enforcement and military system."

That is precisely the problem. It is these very corrupt officials who would be enforcing the treaty for the Mexican Government. And it is these same corrupt officials who woud be in a position to receive sensitive narcotics information from the United States Government.

Rather than using such information to stop drug trafficking and arrest the traffickers, corrupt Mexican officials would be able to assist criminal elements, avoid detection and prosecution. Indeed, this is already happening according to Mr. von Raab.

The Commissioner wrote, "This corruption has effectively precluded our working with Mexican authorities on narcotics interdiction . . . The law enforcement information available to use suggests that at best Mexico is making merely a token attempt to address the issue of narcotics trafficking . . ."

Mr. von Raab stated, "Powerful Mexican officials are providing safe havens to drug traffickers and making it possible for narcotics to be smuggled into and out of Mexico with impugnity."

The Commissioner further stated that "the Mexican officials were so unresponsive to requests for narcotic related financial in-

formation that out of frustration Customs officials have ceased working with the Mexicans."

If the Mexican Government has refused to be responsive to requests for information thus far, what logical reason is there to believe that they will suddenly furnish the United States with pertinent information by virtue just because of this treaty?

The lack of cooperation by the Mexican Government in the war against drugs is well known and well documented.

On March 16, 1988, at a hearing of the Senate Drug Caucus, Senator D'Amato asked Commissioner von Raab: "Do you know of any major drug traffickers who have been tried, convicted and sentenced in Mexico?" Mr. von Raab answered, "I do not know of a single one."

If the Mexican Government has not been serious enough about the war on drugs to convict and sentence any major drug trafficker, then it is apparent that they are not serious enough to enter into a permanent treaty.

This treaty covers mutual legal assistance in criminal matters. Yet it is clear that the government of Mexico has not only refused to cooperate in the war against drugs, but has also refused to cooperate with the United States in the war against criminals.

In August 1987, a Honduran citizen, planted a bomb in a restaurant in Honduras which wounded five American servicemen. One suspect in this crime, Alfonso Guerrero, sought, and was granted, asylum in the Embassy of Mexico in Honduras.

Mr. Guerrero was formally charged with this crime, and the Government of Honduras requested that he be turned over so that he could be brought to justice. The Mexican government refused to release Guerrero to the Honduran authorities.

Once again, the Government of Mexico slapped the United States in the face by refusing to cooperate in bringing to justice a terrorist—a case which involved U.S. servicemen serving abroad.

If the U.S. Government requests evidence to try a terrorist in a U.S. court, what assurances do we have—given their past record—that Mexico would provide us with all relevant information?

As recently as June of this year, Mexico again showed its contempt for the United States, and for the law, by refusing to extradite to the United States a convicted Puerto Rican terrorist. The terrorist, William Morales, was arrested in New York in 1978 on explosives and weapons charges. He was named as a leader of the Puerto Rican FALN, a terrorist organization responsible for 110 bombings in the United States and Puerto Rico. Morales was convicted in federal court and sentenced to 99 years.

In 1979, while Morales was in Bellevue Hospital in New York, where he was being fitted for a pair of artificial hands, Morales nevertheless escaped by cutting through a wire mesh window and lowering himself down a 40 foot rope made out of artificial bandages.

Two New York policemen were killed while trying to apprehend Morales. He escaped to Mexico, where he was arrested on May 28, 1983, after a shootout in the state of Puebla. He confessed that he was planning to bomb the site where U.S. and Mexican congressmen where holding a conference. After serving several years in a Mexican prison, Morales was released and given safe passage to

Havana, Cuba, under the protection of the DGI—the Cuban intelligence service.

After Mexico's refusal to extradite Morales to the United States, the United States recalled its Ambassador from Mexico for a week, and denounced the action of the Mexican Government as "outrageous" and added that it "undercuts the fight of international terrorism by legal means."

If the Mexican Government refuses to comply with the already existing United States-Mexico Extradition Treaty of 1978, why should the United States enter into another permanent treaty with that government?

The Mutual Legal Assistance Treaty with Mexico provides for a Coordinating Authority in each State which is responsible for complying with requests or transmitting them to the competent authorities to do so. For the United States, the Department of Justice will be the Coordinating Authority. For the United Mexican States, the Procuraduria General de la Republia—that is, the Attorney General—will be the Coordinating Authority.

There have been many allegations that high level officials in the Office of the Mexican Attorney General, and those under his control, (such as the Mexican Federal Judicial Police), are involved in one way or another in narcotics corruption, and in the protection of major drug traffickers.

Under this treaty, there is no way to be sure that no information will reach the hands of those officials involved in drug trafficking, and in protecting drug traffickers. In other words, many of these corrupt officials are the same officials who would be entrusted to enforce this Treaty.

A major problem with the Mexico MLAT is the requirement—at the heart of the treaty—to exchange information and legal documents with respect to the investigation of specific criminal activities. Although mutual cooperation is technically discretionary, the MLAT treaties have as their fundamental purpose mutual cooperation in criminal matters.

Therefore, it is not inconceivable that at some time officials in the Mexican Government, under the color of an alleged criminal investigation by that Government, will seek U.S. Government documents relating to counter-narcotics or counter-money laundering activities. In other words, corrupt Mexican Government officials can use the MLAT treaty to discover the measures and information used by the U.S. Government against certain persons in Mexico. In turn, corrupt Mexican officials would be able to tip off certain criminals as to what information the United States has about their alleged criminal activities.

Under Article 1, Section 4(d) of this treaty, the United States would be required to "immobilize, secure or forfeit assets" on behalf of the Mexican Government. Given that we have already established that officials in the Mexican Government have been suborned by the drug traffickers or are themselves drug traffickers, it is not unlikely that the United States Government would be asked to attach the assets of criminal competitors of the very officials making the request under provision of the MLAT.

Under Article 1, Section 4(g) of the MLAT, the United States would be required to "locate persons" for the Mexican Govern-

ment. This provision might enable corrupt Mexican officials to cooperate with criminal elements to "locate" informers who have provided the U.S. Government with important information regarding criminality between the two countries.

In conclusion, this Senator believes that it is unwise to ratify treaties with governments which are suspected of engaging in narcotics activities of all kinds—and at the highest levels—and thereby subvert democracy in their own countries.

To concluded such an agreement with the Government of Mexico at this time would make a mockery of law and order. A treaty with the corrupt officials of Mexico would send exactly the wrong message to the young people in our own country.

If this treaty with Mexico is ratified, the United States would send a message to the citizens of both countries that the United States is willing to cut deals with drug traffickers. The United States would send a message that we are willing to assist corrupt governments, even when they have refused to cooperate in the past.

We simply cannot trust the corrupt Mexican officials to comply with the terms of this treaty. This treaty should not be ratified unless and until it is amended to ensure that corrupt officials will not have access to U.S. Government information on criminal activities.

Protecting the Constitutional Rights of Americans

During consideration of the Genocide Convention in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to this Treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This Treaty seeks to enhance national and international law inforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The Treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seeks to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the United States Constitution.

Other countries could demand evidence from the United States that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So the question is this: Will this Treaty unintentionally result in an infringement upon the Constitutional rights and freedoms of American citizens.

As these treaties are currently drafted, we can be certain there will be a full scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—

strongly opposed enactment of these treaties "as is" in hearings of the Senate Foreign Relations Committee.

Mr. Chairman, there is a dispute among scholars as to whether or not the Constitution of the United States supersedes treaties in all instances. Nor have the courts settled this issue. The State Department has cited *Reid* v. *Covert*, 354 U.S. 1 (1956), as standing for the proposition that the Constitution always prevails where a case concerns matters both within the territorial boundaries of the United States or in foreign lands.

Yet, such an interpretation misreads the *Reid* v. *Covert* holding. This case holds only that executive agreements consummated by the President without advice and consent of the Senate must conform to the Constitution in all circumstances. Treaties, however, are not executive agreements; indeed treaties are another matter.

As the distinguished justice and legal scholar, John Marshall Harlan III, wrote in his concurring opinion in *Reid* v. *Covert*, "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world . . . The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place." (Harlan, J., concurring, at 74).

Furthermore, in *Missouri* v. *Holland*, 252 U.S. 416 (1920), Justice Holmes suggested that there is no substantive limit to the treaty-making power. In *Ware* v. *Hylton*, 3 Dall. 199, 284 (1796) Justice Cushing wrote that the "Treaty . . . is of equal force with the Constitution.

I wish it were the case that the Supreme Court had conclusively determined that the Constitution is supreme in all cases. But since this determination has not been made, a reservation is necessary to assure that Constitutional rights of Americans are not abridged by the execution of these treaties.

For those who hold the view that the Supreme Court has held that the Constitution supercedes a treaty, then these reservations merely confirm their beliefs. However, if that view is wrong; this reservations will save the day.

In addition, under Article 27 of the Vienna Convention on the Law of Treaties—which the State Department perceives as customary international law—no state may "invoke the provisions of its internal law as justification for failure to perform a treaty." So even if we all are agreed that the Constitution—our fundamental internal law—takes precedence, international law seems to be pointing in the other direction.

Indeed, this possibility that the United States might be found in default of international obligations was a major factor in the Committee's approval of the Constitutional Reservation to the Genocide Convention.

As the Committee Report on the Genocide Convention stated:

> (t)he problem is that international law does not recognize the Constitution as supreme.
>
> Article 27 of the Vienna Convention on the Law of Treaties, which represents customary international law on this

point, provides that no state may "invoke the provisions of its internal law as justification for its failure to perform a treaty".

Thus, without the Committee's recommended reservation, were a conflict to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in deault of its international obligation.

Just as was the case with the Genocide Convention, a reservation is necessary for this Mutual Legal Assistance Treaty to assure that if a conflict arises between the requirements of the Constitution and those of the Treaty, the United States will not be found to be in default of its international obligation. That is why a reservation is necessary to make the supremacy of the Constitution a part of the Treaty itself and therefore enforceable.

Specifically, the Senate should add a reservation identical to the Lugar-Helms reservation added to the Genocide Convention. It simply provides that:

> Nothing in this Treaty requires or authorizes legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States.

Such a proposal would constitute what some would call a category II amendment. It would be included in the instruments of ratification exchanged with the other countries, yet would require no renegotiation. The other party would simply accept it by ratification, and the constitutional rights of Americans would be secure.

JESSE HELMS.

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